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Supreme Court, U.S.
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No. 00-597

In the Supreme Court of the United States

ALTADIS U.S.A. INC., AS SUCCESSOR TO CONSOLIDATED CIGAR CORPORATION AND HAVATAMPA, INC.; GENERAL CIGAR CO., INC.; JOHN MIDDLETON, INC.; LANE LIMITED, AS SUCCESSOR TO TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.,

PETITIONERS,

V.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether Massachusetts' viewpoint-based prohibition on virtually any public display of cigar advertisements violates the First Amendment, either under the strict scrutiny standard that Petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980).

PARTIES TO THE PROCEEDING

The Petitioners in No. 00-597 are Altadis U.S.A. Inc. as successor to Consolidated Cigar Corporation and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, as successor to Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; and Swisher International, Inc. The Petitioners in No. 00-596, which has been consolidated with No. 00-597, are Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company (formerly United States Tobacco Company). The Respondent in both cases is Thomas Reilly, the Attorney General of Massachusetts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 218 F.3d 30. The opinion of the district court (Pet. App. 51a-99a) is reported at 84 F. Supp. 2d 180.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2000. The petition for a writ of certiorari was filed on October 18, 2000, and granted on January 11, 2001. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The challenged regulations of the Massachusetts Attorney General, which are codified at 940 C.M.R. 22.00, are set out in the Appendix to the Petition, Pet. App. 100a-111a.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

The leading cigar manufacturers combined spent only $50,500 on outdoor advertisements *nationwide* in 1997. Court of Appeals Joint Appendix ("C.A.J.A.") 2874.04. They do not use *any* billboards in Massachusetts. Pet. App. 31a. Indeed, very little cigar advertising of any sort is visible from the outdoors in

Massachusetts. *Id.* There is no evidence that the miniscule amount of outdoor cigar advertising that does exist has contributed in any way to youth smoking of cigars. Nonetheless, the Massachusetts Attorney General in 1999 promulgated regulations banning cigar advertising visible from the outdoors (and indoor cigar advertising below five feet) from virtually every populated area of the Commonwealth, claiming that was necessary to shield minors from exposure to positive images of cigars. *See* 940 C.M.R. § 22.00 *et seq.* (the "Cigar Regulations").

In particular, the portions of the Cigar Regulations at issue here include rules that prohibit any cigar advertising visible from the outdoors, and any indoor cigar advertising placed lower than five feet from the floor, within one thousand feet of any playground or school. 940 C.M.R. § 22.06(5)(a) and (b). Other portions at issue here ban the use of self-service displays in all retail outlets and require retail outlets to place all cigars out of the reach of all consumers, 940 C.M.R. § 22.06(2)(c) and (d), and ban sampling of cigars in retail outlets, 940 C.M.R. § 22.06(1)(a).

Petitioners L.J. Peretti Co. (hereinafter "Peretti"), a Boston tobacconist, and seven major cigar manufacturers (hereinafter the "Cigar Manufacturers", and collectively with Peretti the "Petitioners"), filed suit to enjoin the Attorney General of Massachusetts from enforcing the above-referenced provisions of the Cigar Regulations, and alleging violations of the First and Fourteenth Amendments and the Commerce Clause.[1] The district court consolidated this case with

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[1] Petitioners also challenged 940 C.M.R. § 22.04, which requires the placement of a warning label on 25% of the front or top of each package of machine-manufactured cigars

challenges brought by cigarette and smokeless tobacco companies in *Lorillard Tobacco Co. v. Reilly* and *United States Tobacco Co. v. Reilly*.

On January 24, 2000, the district court granted summary judgment for Petitioners on their First Amendment challenge to the ban on indoor retail cigar advertising below five feet. Pet. App. 98a-99a. The district court denied Petitioners' challenges to the other advertising restrictions and labeling requirements and granted summary judgment to the Attorney General on those claims. *Id.*

The court of appeals affirmed in part and reversed in part. Pet. App. 45a. In relevant part, it affirmed the district court's ruling that the bans on outdoor cigar advertisements and self-service cigar displays do not violate the First Amendment, *id.* at 39a, 41a-42a, and held that the ban on indoor advertising below five feet also withstands First Amendment scrutiny. *Id.* at 35a.

The court of appeals believed that it was constrained to review Petitioner's First Amendment challenge to the Cigar Regulations under *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980). Pet. App. 18a-19a. Applying the four-part *Central Hudson* test, the court first noted the Attorney General's concession for purposes of summary judgment that "the tobacco advertisements here are truthful, nonmisleading speech about a lawful activity." *Id.* at 19a. The court

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manufactured, packaged, imported for sale, or distributed within Massachusetts, and 940 C.M.R. § 22.05, which requires the placement of a warning label on 20% of each cigar advertisement appearing in Massachusetts. The court of appeals agreed with Petitioners that these provisions violate the Commerce Clause, Pet. App. 49a, and the Attorney General did not seek this Court's review of that determination.

then found that the Commonwealth had demonstrated a substantial interest in reducing tobacco consumption by minors, *id.*, a conclusion Petitioners did not dispute.

Turning to the third prong of the *Central Hudson* analysis, the court of appeals acknowledged that "the advertising of cigars is nearly nonexistent in comparison with the pervasive promotion of cigarettes." Pet. App. at 31a. It also recognized as "forceful" Petitioners' argument that banning the miniscule amount of cigar advertising would not materially reduce youth cigar smoking. *Id.* Yet even though it identified no evidence in the record that cigar advertisements – as opposed to the vastly different cigarette advertisements – have any effect on youth cigar smoking, the court nonetheless upheld Massachusetts's virtually total ban on cigar advertising "as part of a rational and well-founded comprehensive regulatory scheme." *Id.* at 31a. Applying an unprecedented "balancing" test to the third prong of *Central Hudson*, the court found the Cigar Regulations constitutionally permissible because, "[a]lthough fewer children will be affected by cigar advertising, simply because there is much less of it, the relative lack of cigar advertising means that the burden imposed on cigar advertisers is correspondingly small." *Id.* at 31a.

Finally, addressing the fourth prong of *Central Hudson*, the court of appeals held that the restrictions on indoor and outdoor cigar advertising were sufficiently "narrowly tailored to achieve the desired objective." Pet. App. 33a (citation omitted). The court relied almost entirely for this conclusion on the FDA's proposed outdoor advertising regulations, *id.* at 34a, even though those proposed regulations expressly exempted cigar advertising and were based on an analysis of billboards for cigarettes, not window

displays for cigars. Joint Appendix ("J.A.") 227-28; Pet. App. 72a. The court expressed some misgivings about the rationality of the five-foot indoor display rule. *Id.* at 35a. Moreover, it acknowledged that Petitioners had "quite a strong" argument that the Cigar Regulations would leave "small vendors of tobacco products" with no "reasonable alternative means for communication with the public." *Id.* at 37a. But the Court nonetheless concluded that the "burden imposed on adult commercial communication within the 1000-foot perimeter is not so great as to render the regulations invalid under *Central Hudson*." *Id.* at 39a.

SUMMARY OF THE ARGUMENT

Petitioners join in the argument presented by the petitioners in *Lorillard Tobacco Co. et al. v. Reilly*, No. 00-596 ("the Cigarette Manufacturers"), that the Commonwealths' consent and viewpoint-based discrimination against truthful speech about tobacco products should be subject to and cannot survive strict scrutiny. This brief, however, focuses on the unique aspects of cigar advertisements that render the ban on cigar advertising unconstitutional even under the less stringent, intermediate scrutiny test outlined in *Central Hudson*, because the Attorney General failed to show either that the ban on cigar advertisements will directly and materially advance the Commonwealth's interest in reducing youth cigar smoking, or that the regulations are narrowly tailored to serve that interest.

I. Evidence introduced by the Attorney General establishes that cigars increased in cultural acceptance during the mid-1990s, and that certain health organizations and the Attorney General disapprove of this development, but there is simply no evidence in

the record demonstrating that outdoor cigar advertisements contribute to youth cigar smoking or that banning such advertisements would decrease youth cigar smoking. The lack of any evidence linking cigar advertisements to youth cigar smoking should have been fatal under any application of *Central Hudson*.

The court of appeals, however, erroneously upheld the ban on cigar advertisements based on "anecdotal" evidence of a correlation between *cigarette* advertising and youth *cigarette* smoking. The court then compounded that error by applying an unprecedented balancing test, concluding that the Attorney General did not need to show that banning cigar advertising would materially reduce youth cigar smoking because, in the court's view, the cigar industry (which does not advertise much) will not suffer much from the ban. Neither the court's reliance on anecdotal evidence about cigarettes, nor its constitutionally inappropriate balancing analysis, can be squared with this Court's jurisprudence. The lack of proof that the advertising ban will directly and materially reduce youth smoking renders the ban plainly violative of the First Amendment under the third prong of *Central Hudson*.

II. The cigar advertising ban is also insufficiently tailored to pass muster under the fourth prong of *Central Hudson*. The evidence in this case shows that the advertising ban's 1000-foot radius would prohibit all window and other outdoor advertising, as well as all indoor advertising below five feet, in more than 90% of the Commonwealth's three largest cities, with comparable effects in its other populated regions. These prohibitions would eliminate the ability of many small merchants to advertise cigar products, and impermissibly relegate the vast majority of adults in

the Commonwealth to that speech which the Attorney General deems suitable for children.

The court of appeals upheld the Attorney General's assertion that these severe burdens on commercial speech are necessary to curb youth cigar smoking based primarily on the FDA's proposal of a 1000-foot advertising ban. That was plain error. To the extent the FDA's proposal provides any support for the Commonwealth's regulation of *other* tobacco products, it manifestly does not support the necessity of a 1000-foot ban on *cigar* advertising, which the FDA expressly exempted from regulation.

The Attorney General's failure to demonstrate a need for (or, indeed, any purpose to) the Commonwealth's near-total ban on outdoor and in-store cigar advertising is all the more striking for the Attorney General's correlative failure to refute the availability of feasible, less speech-restrictive alternatives. For example, the record demonstrates little in the way of any serious governmental attempt to curb youth cigar smoking through its own anti-cigar message, and the Commonwealth has chosen not to follow the lead of many other states that have enacted laws making underage purchases of tobacco products illegal or establishing licensing requirements, even though the Attorney General has conceded that such licensing requirements could drastically reduce sales of tobacco products to minors. Moreover, unchallenged portions of the Cigar Regulations include "secret shopper" requirements that require retailers to increase surveillance to ensure that their employees do not sell cigars to minors. The Attorney General's failure first to gauge the effectiveness of counter-speech campaigns and laws that operate directly to restrict minors' access to cigars fatally undermines his

contention that the Commonwealth's reflexive ban on truthful speech is narrowly tailored to achieve an end not attainable by less speech-restrictive alternatives.

ARGUMENT

Petitioners join fully in the argument of the Cigarette Manufacturers that strict scrutiny should apply here. The Attorney General has never contended that the cigar advertising ban could survive that review – for good reason. As discussed below, the challenged portions of the Cigar Regulations are patently invalid even under the relaxed, intermediate scrutiny standard applied in *Central Hudson*.

Central Hudson outlines a four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566.

As the court of appeals noted, the Attorney General did not challenge on summary judgment that the cigar advertisements at issue here concern lawful activity and are not misleading. Pet. App. 19a. Likewise, Petitioners have not challenged that the Commonwealth has a substantial interest in reducing youth cigar smoking. The cigar advertising ban founders, however, on the third and fourth prongs of

the *Central Hudson* test, because the Attorney General failed to adduce evidence establishing that the ban on cigar advertising will directly and materially advance the Commonwealth's interest in reducing youth cigar smoking, or that this near-total ban on cigar advertising is narrowly tailored to serve that interest.

I. THE ATTORNEY GENERAL FAILED TO ESTABLISH THAT THE BAN ON CIGAR ADVERTISING WILL DIRECTLY AND MATERIALLY REDUCE YOUTH CIGAR SMOKING, AS REQUIRED UNDER THE THIRD PRONG OF *CENTRAL HUDSON*

A. The Attorney General Cannot Satisfy His Burden Under The Third Prong Of *Central Hudson*, Using Decades-Old Anecdotal Evidence Regarding Advertising Of Other Tobacco Products

The court of appeals found that "the advertising of cigars is nearly nonexistent in comparison with the pervasive promotion of cigarettes." Pet. App. 31a. It acknowledged that "the cigar makers do not use any billboards in Massachusetts." *Id.* It also emphasized that the cigar manufacturers "spent only $50,500 on outdoor advertising in the entire United States during 1997, compared to the nearly $300 million spent by the leading cigarette manufacturers in that year." *Id.*[2]

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[2] Similarly, the Cigar Manufacturers engage in relatively little national magazine and newspaper advertising. The five leading cigar manufacturers, producing over 90% of the cigars sold nationally, spent a total of only about $10.5 million on magazine and newspaper advertising, including trade media, throughout the United States in 1997, whereas the five leading cigarette manufacturers spent approximately $254 million – almost twenty-five times as much. *See* C.A.J.A. 2544, 2854 n.1, 2874.04. In total,

In particular, according to the Attorney General's own study, *Massachusetts Operation Storefront – 1998*, cigar advertising and packages visible from the outdoors in Massachusetts are virtually imperceptible and are utterly insignificant compared to cigarette outdoor advertising and all other outdoor advertising. The study reported only 23 cigar "advertising exposures," compared to 3,839 cigarette advertising exposures and 7,203 total exposures, in surveyed storefronts within 1000 feet of Massachusetts schools. *See* C.A.J.A. 2424. Additionally, there were only 36 cigar advertising exposures, compared to 4,244 cigarette advertising exposures and 8,700 total exposures, more than 1000 feet from Massachusetts schools. *See id.* This evidence submitted by the Attorney General indicates (i) that cigar advertising exposures constitute only 0.32% of total advertising exposures within the 1000 foot radius; (ii) that there are 99.6% more cigarette than cigar advertisements within the 1000 foot radius; and (iii) that cigar advertising exposures (as a percentage of total advertising exposures) were more common *away* from schools, rather than close to schools. *See id.* This demonstrates that outdoor cigar advertising is minuscule in amount, and that it is not in any way targeted towards children.

The court of appeals relied heavily on the Food and Drug Administration ("FDA") regulations, invalidated by this Court in *FDA v. Brown & Williamson*, 120 S. Ct. 1291 (2000), to support the Attorney General's

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the five leading cigar manufacturers spent only $41 million on advertising and promotional expenditures in 1997, while the five leading cigarette manufacturers spent approximately $5.66 billion on advertising and promotion in 1997. *See* C.A.J.A. 2544, 2874.04.

assertions that cigarette and smokeless advertising affects youth use. Pet. App. 30a, 34a. The FDA's regulations, however, recognized definite, profound difference between cigars and the way they are marketed and cigarettes and the way they are marketed, and for this reason the FDA decided not to include cigars in its regulation of cigarettes and smokeless tobacco advertising and marketing in 1996. *See* J.A. 227-28. Indeed, the FDA noted that there were sharp differences even between cigarettes and little cigars:

> The differences between little cigars and cigarettes are significant – the products are easily distinguishable, taxed at different levels, and marketed to different consumers. Moreover, little cigars are neither advertised extensively nor sold in vending machines. Most importantly, the agency is not currently aware of sufficient evidence of use of little cigars by children or adolescents to support inclusion of such products in the rule.

Id. at 228.[3]

Despite recognizing these differences between cigar and cigarette advertising, the court of appeals held

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[3] The court of appeals suggested that the FDA's determination in 1996 not to include outdoor cigar advertising in its tobacco advertising ban may have been based on out-of-date cigar *use* data. *See* Pet. App. 27a, and n.9. But there no evidence that the FDA lacked access to cigar smoking prevalence data, or was unaware of the increase in cigar publicity, acceptability and consumption that, according to the National Cancer Institute's Smoking and Tobacco Control Monograph No. 9 (the "NCI Monograph"), began in 1993, *see* J.A. 243, 245, and no evidence that the differences between cigar and cigarette advertising noted by the FDA have changed in any way since 1996.

that the ban on outdoor cigar advertisements satisfied the third prong of *Central Hudson* based on "anecdotal evidence" of smokeless tobacco advertising in the 1960s and 1970s and cigarette advertising in the 1940s and 1950s. Pet. App. 28a. Citing claimed links between *cigarette* and *smokeless tobacco* advertising and youth smoking, the court found that "children exposed to *tobacco* advertising near their schools and play areas are likely to be affected by its message." Pet. App. 31a (emphasis added). This reasoning cannot withstand any First Amendment scrutiny.

Through its vague reference to "tobacco" advertising as opposed to "cigar" advertising, Pet. App. 31a, the court of appeals glossed over the most critical fact in this case: the complete lack of evidence demonstrating that *cigar* advertising affects youth cigar smoking. Instead, extrapolating from the evidence regarding *cigarette* and *smokeless tobacco* advertising, the court of appeals speculated that children are "affected by" the virtually non-existent cigar advertising, even though there is no evidence that the cigar advertising has a similar effect on children. *Id.* at 31a.

The cited evidence about different products, different advertising, and different time periods is a far cry from the kind of direct evidence about the particular type of advertising being banned that this Court has required under *Central Hudson* and its progeny. *See, e.g., Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 189 (1999) (observing that "the Government fail[ed] to 'connect casino gambling and compulsive gambling with broadcast advertising for casinos' – let alone broadcast advertising for non-Indian commercial casinos"). Furthermore, this Court has made it clear that

"anecdotal" evidence is insufficient to satisfy the government's burden under *Central Hudson* to establish that the speech restrictions at issue would directly and materially advance its interests. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (holding that "anecdotal evidence and educated guesses" were not "convincing evidence that the labeling ban ha[d] inhibited [alcohol] strength wars" between beer advertisers). Indeed, the Attorney General's reliance on these thirty-to-sixty-year-old experiences regarding different products only highlights the complete absence of direct evidence demonstrating that banning cigar advertising would today directly and materially reduce youth cigar smoking.

The court of appeals cited only one piece of evidence that actually concerned cigars. It referred to the National Cancer Institute's Smoking and Tobacco Control Monograph No. 9 (the "NCI Monograph") as demonstrating that cigar smoking was a health problem for youth. *Id.* at 27a. But whether the Commonwealth has a substantial state interest in curbing youth cigar smoking (which Petitioners have not contested in this action) says nothing about whether the cigar advertising the Attorney General has targeted contributes to youth cigar smoking, or whether banning such cigar advertising would materially decrease youth cigar smoking.

In fact, the NCI Monograph itself undermines any argument that cigar advertising drives consumption even by adults, much less minors. To the contrary, it states that the dramatic increase in cigar acceptability and consumption "has been closely associated with" the advent of *Cigar Aficionado* in 1992. C.A.J.A. 2785. It notes the increase in cigar dining and entertainment,

retail specialty tobacco shops, and cigar bars. *See* J.A. 245-46. It also notes that "the resurgence in popularity of cigars has been covered, *and in part fueled by*, articles in newspapers." *Id.* at 246. (emphasis added). It thus finds that the cigar "promotional activities" that may have increased smoking "are not necessarily the result of activities by commercial interests." *Id.* at 245. By comparison, it reports that "[o]nly a small amount of conventional advertising appears for cigars." C.A.J.A. 2780. Most importantly, it concludes there is insufficient evidence linking cigar advertising to youth smoking, and calls for additional "[r]esearch to learn the extent to which advertising and promotion for cigars . . . reaches and affects kids." *Id.* at 247. It does not report or suggest that the cigar advertising targeted by the Attorney General has in any way contributed to increased youth cigar smoking.[4]

The only other evidence that the Attorney General adduced in this litigation to justify the cigar advertising ban is as follows:

- The district court referred to a 32% increase in total cigar advertising from 1996 to 1997 reported by the FTC. *See* C.A.J.A. 2855, Pet. App. 78a. But this figure masks the fact that total outdoor cigar industry advertisements

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[4] The district court cited cigars as "symbols of success, elegance, and athleticism" as shown in "the glossy magazines *Cigar Aficionado* and *Smoke*." C.A.J.A. 4689. Notwithstanding the NCI Monograph's conclusion that there was insufficient evidence linking cigar advertising to youth cigar smoking, J.A. 247, the district court speculated that the "lifestyle" message in these magazines may be "appealing" to youth – even though there is no evidence linking this supposed "lifestyle" message to an increase in youth cigar smoking, or that outdoor cigar advertising contains such "lifestyle" messages. *See* 940 C.M.R. § 22.06(5).

increased from only $35,000 in 1996 to only $50,500 *nationwide* in 1997. *See* C.A.J.A. 2874.04. There is no evidence that this miniscule amount of outdoor cigar advertising has had any effect on youth cigar smoking nationwide, much less in Massachusetts.

- The district court pointed to a 1996 survey that 26.7% of teenagers had smoked a cigar in the preceding year. *See* Pet. App. 78a. Although this may validate the Commonwealth's interest in preventing youth access to cigars under the second prong of *Central Hudson*, which Petitioners do not dispute, it has no bearing on whether banning outdoor cigar advertising would reduce youth cigar smoking under the third prong of *Central Hudson*.

- The district court also speculated that the Attorney General desired to prevent youths from switching from regular cigarette smoking to regular cigar smoking in the future as cigarette advertising diminishes, *see* Pet. App. 79a, but the Attorney General presented no evidence that the cigar advertising ban was based on such a consideration, and adduced no evidence that outdoor cigar advertising in fact causes youth to switch from cigarettes to cigars.

- The Attorney General asserted that in the early 1970s television advertising of little cigars briefly increased, as did sales of little cigars, after radio and television cigarette advertising was banned. Attorney General's First Circuit Brief at 46-47. But this occurred

> almost thirty years ago; it involved television rather than *outdoor* advertising; and it reveals nothing about the effect of outdoor cigar advertising on *youth* cigar smoking.[5]

The record thus contains no evidence that outdoor cigar advertising (or indoor advertising below five feet) contributes to youth smoking of cigars, much less that banning such cigar advertising would directly and materially reduce youth cigar smoking. Yet such a link is precisely what this Court's jurisprudence requires. In *Greater New Orleans Broadcasting*, this Court recognized that the government must present evidence showing that banning the *specific* type of advertising at issue would alleviate the supposed harm. 527 U.S. at 189. The Court held that "the Government fail[ed] to 'connect casino gambling and compulsive gambling with broadcast advertising for casinos' – let alone broadcast advertising for non-Indian commercial casinos." *Id.*

Likewise, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court found that evidence "that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of moderate means" was insufficient because "the State has presented no evidence to suggest that its speech prohibition will significantly reduce marketwide consumption." *Id.* at 506. Here, there is even less evidence to support the speech ban; the Attorney

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[5] There is also no evidence justifying the ban on indoor cigar advertising below five feet, as the district court noted. Pet. App. 80a. Indeed, even the court of appeals conceded that it makes little, if any, sense to presume that "minors under five feet tall will not, or will less frequently, raise their view above eye-level." *Id.* at 35a.

General has not presented evidence that the ban on cigar advertising would have *any* effect. *See also Coors Brewing Co.*, 514 U.S. at 490 (holding that "anecdotal evidence and educated guesses" were not "convincing evidence that the labeling ban ha[d] inhibited [alcohol] strength wars" between beer advertisers).

Given the *de minimis* amount of relevant cigar advertising relative to the much greater number of *non-advertising* cigar exposures discussed in the NCI Monograph, the Attorney General plainly cannot rely here solely on an intuitive link between advertising and consumption to demonstrate that banning outdoor cigar advertising will directly and materially reduce youth smoking. For example, in *Coors Brewing Co.*, this Court held that, where manufacturers were still able to include alcohol content in advertising, banning alcohol content on labels would not directly and materially reduce the risk of strength wars. 514 U.S. at 488. Likewise, in *Greater New Orleans*, the Court held that a ban on advertising of non-Indian casinos would not directly and materially reduce the demand for gambling when the law specifically permitted advertising of Indian gaming to continue. 527 U.S. at 190-92. And, in *ACLU v. Reno*, 521 U.S. 844 (1997), the Court raised the issue that banning Internet content in the United States would be ineffective to prevent minors from accessing pornography when similar content is equally accessible from unregulated foreign Internet cites. *Id.* at 878 n.45. As Justice Scalia wrote in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), "a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [the government's] supposedly vital interest unprohibited." *Id.* at 541-42 (Scalia, J., concurring).

The NCI Monograph, on which the Attorney General so heavily relies, concludes that the advent of *Cigar Aficionado*, the use of cigars by celebrities, and the proliferation of social events featuring cigars "have increased the visibility of cigar consumption, have normalized cigar use, and have broken down barriers for cigars." C.A.J.A. 2797-98.[6] Faced with this apparent increased cultural acceptance of cigar smoking, the Attorney General has responded impulsively (and paternalistically) by seeking to choke off the flow of information between cigar retailers and manufacturers and their customers. In such a situation, courts should be particularly concerned with ensuring that the state has sufficient evidence to support a ban on constitutionally protected speech. Instead, the lower courts here have upheld a ban on speech based entirely on evidence concerning advertising of *different* products, and indeed products whose advertising has been found to be profoundly distinct from the advertising to be banned. If *Central Hudson* has any teeth, this meager evidentiary showing cannot validate the Commonwealth's near-total ban on Petitioners' truthful commercial speech.

B. The Attorney General's Failure To Establish That Banning Cigar Advertising Will Directly And Materially Reduce Youth Cigar Smoking Cannot Be Excused By The First Circuit's Observation That

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[6] As noted above, the NCI Monograph concedes that that these cigar promotional activities "are not necessarily the result of activities by commercial interests", J.A. 245, and that further research is needed "to learn the extent to which advertising and promotion for cigars . . . reaches and affects kids." *Id.* at 247.

Cigar Manufacturers And Retailers Do Not Advertise Much Anyway

The court of appeals excused the Attorney General's failure to satisfy the third prong of the *Central Hudson* test based on an unprecedented and flatly unconstitutional balancing approach. Although it recognized as "forceful" Petitioners' argument that banning the miniscule amount of cigar advertising at issue could not materially reduce youth cigar smoking, Pet. App. 31a, the court observed that "the relative lack of cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small." *Id.* In the court's view, the Attorney General satisfied the third part of *Central Hudson* because whatever benefit might be achieved by banning cigar advertisements outweighs the "burden" on cigar manufacturers and retailers because they do not advertise much in any event. *Id.*

This balancing approach is manifestly inconsistent with *Central Hudson*. Under the third prong of *Central Hudson*, a court does not question the "burden" of banning speech; it is presumed under First Amendment jurisprudence that any ban on speech is *per se* harmful. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedom, for even minimal periods of time, unquestionably constitutes irreparable injury."). Instead, under the third prong of *Central Hudson*, it is the state's obligation to prove that banning the specific type of speech affected will directly and materially advance the state's significant interest. *See, e.g., Greater New Orleans*, 527 U.S. at 189 (holding that "the Government fail[ed] to 'connect casino gambling and compulsive gambling with broadcast advertising for casinos' – let alone broadcast advertising for non-Indian commercial

casinos"). The court of appeals impermissibly resorted to balancing here to avoid the conclusion that necessarily follows under *Central Hudson* from the Attorney General's failure to demonstrate that the cigar advertising ban would directly and materially reduce youth cigar smoking; *i.e.*, that the ban is unconstitutional and cannot be enforced.

II. THE ATTORNEY GENERAL FAILED TO ESTABLISH THAT THE BAN ON CIGAR ADVERTISING IS NARROWLY TAILORED TO SERVE THE COMMONWEALTH'S INTEREST, AS REQUIRED UNDER THE FOURTH PRONG OF *CENTRAL HUDSON*

The strikingly broad reach of this cigar advertising ban becomes most clear by examining its effect on the speech of small vendors, such as traditional cigar retailers. Petitioner Peretti, for example, has been located on Park Square across from the Boston Common for over a century. *See* C.A.J.A. 3136 ¶ 2. Because the City of Boston placed an athletic field in the Common less than one thousand feet from Peretti's location, the cigar advertising ban, by its terms, would require Peretti to strip its facade of the term "Tobacconist" and the word "Cigars" (*see* C.A.J.A. 3137 ¶ 4, 3141), destroying its ability to communicate to the passing public. Peretti is also forbidden from displaying cigar packages with their distinctive logos in such a fashion as they could be seen through the front window. Indeed, Peretti must remove any cigar package displays within five feet of the floor and eliminate self-service displays, unless it posts a guard at the door and bans all children from the store. Under

the Attorney General's scheme, Peretti must forbid parents even from wheeling infants onto its premises.[7] Traditional tobacconists such as Peretti are effectively silenced in their attempts to communicate with and attract adult retail customers.

It was the Attorney General's burden to prove that these severe restrictions on cigar advertising are "no more extensive than necessary to further the State's interest." *Central Hudson*, 447 U.S. at 569-70. Accordingly, as the district court noted, "[t]he government must show, somehow, that the decision to choose 1000 feet as the target zone is narrowly tailored to effectuate the governmental purpose." Pet. App. 72a. This is an especially heavy burden because, given the prevalence of schools, parks, and playgrounds, the limit imposed on the advertising ban (1000 feet from any school or recreational area) "exhibits a real danger of swallowing up everything by being de facto no limit at all." *Id.* at 74a; *see also id.* at 33a. (noting that the 1000-foot radius would prohibit cigar advertising in up to 90% of the largest metropolitan areas in the Commonwealth).

The *only* evidence that the court of appeals cited to support the Attorney General's selection of the 1000-foot radius for its outdoor *cigarette* advertising ban was the FDA's determination that a 1000-foot ban is appropriate for other tobacco advertising. *See* Pet. App. at 34a. Even if the findings in these invalidated

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[7] After this litigation was commenced, the Attorney General amended the Cigar Regulations to permit the indoor display of cigar advertising below five feet, and the use of self-service displays, in retail establishments designated as adults-only facilities. To qualify for this exception, a retailer is required to prevent all children from entering the premises, including children accompanied by their parents. C.A.J.A. 4722.

FDA regulations had substantial weight with respect to *cigarette* advertising, the FDA's determination cannot plausibly justify a ban on outdoor *cigar* advertisements. Far from regulating outdoor cigar advertising, the FDA expressly excluded cigar advertising from its ban of other outdoor tobacco product advertising, because of the differences between the marketing of cigars and other tobacco products, and the lack of sufficient evidence to support a ban on outdoor cigar advertising. J.A. 227-28. Thus, there is no evidence whatsoever justifying the 1000-foot ban on cigar advertising.[8]

More generally, the Attorney General failed to prove that *any* restriction on these cigar advertisements is necessary to reduce youth cigar smoking. As demonstrated above, the Attorney General adduced no evidence that banning cigar advertisements will affect youth cigar smoking in an appreciable way.

Before resorting to pointless censorship of truthful commercial speech, moreover, the Commonwealth should have considered viable alternatives to prevent youths from accessing cigars. *See, e.g., Greater New Orleans*, 527 U.S. at 192. For example, the record in this case is replete with evidenee of the

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[8] Petitioners also join in the argument outlined in greater detail in the Cigarette Manufacturers' Brief in *Lorillard Tobacco Co. v. Reilly*, No. 00-596, that the court of appeals inappropriately failed to apply this Court's holding in *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60 (1983), that speech restrictions cannot "'reduce the adult population . . . to reading only what is fit for children,'" *id.* at 73 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)), because the 1000-foot radius would prohibit advertising to adults as well as children in up to 90% of the largest metropolitan areas in the Commonwealth. Pet. App. 33a.

Commonwealth's targeted campaign of counter-speech to reduce youth cigarette smoking. *See, e.g.*, C.A.J.A. 673, 675-76. But there is no evidence that the Commonwealth has used such counter-speech efforts to reduce youth *cigar* smoking with the same focus and intensity. *See, e.g., Linmark Assocs. v. Willingboro*, 431 U.S. 85, 97 (1977) (suggesting that the state use counter-speech rather than speech restrictions to advance its interests). Similarly, the Commonwealth could enact laws to prohibit minors from purchasing cigars, or could implement a retailer licensing requirement, which most states have done and which the Attorney General concedes could "drastically reduce the sale of tobacco products to minors." C.A.J.A. 2937. Finally, the Attorney General could rigorously enforce the unchallenged portions of the Cigar Regulations, which include "secret shopper" provisions requiring that require retailers to increase surveillance to ensure that their employees do not sell cigars to minors. *See* 940 C.M.R. § 22.06(3).

The Attorney General should have considered these and other alternatives and allowed time for the Cigar Regulations' new enforcement mechanisms to take effect, before resorting to banning speech. It is settled law that a state may not "choose suppression over a less speech-restrictive policy." *44 Liquormart*, 517 U.S. at 509.[9]

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[9] The court of appeals also erred in refusing to accord First Amendment protection to cigar self-service displays. Unlike cigarettes or other essentially fungible products, each brand of cigars is unique. *See* C.A.J.A. 3133, ¶ 15. Cigar customers have traditionally sought to handle and compare cigars at the time of purchase through self-service displays, in order to judge their size, weight, texture, density, and even aroma, and thereby reach a purchasing decision. *See id.* The Attorney General's own expert

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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testified that cigar manufacturers compete for the attention of the consumer at the point of purchase. *See* C.A.J.A. 3800-01. Likewise, the district court found that point-of-sale information, such as that provided by self-service displays, is crucial to consumer purchasing decisions. *See* Pet. App. 63a n.7, 83a. Indeed, the district court found that, unique to cigars, the "aroma, feel, and look may be important 'information' for cigar consumers." *Id.* at 81a. This Court has held in other contexts that such self-service displays convey information worthy of First Amendment protection. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 700 (1977).